United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1219

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P/S

To be argued by
FREDERICK T. DAVIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1219

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOHN PAUL BOMMARITO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

John Paul Bommarito appeals from a judgment of conviction entered on May 19, 1975, in the United States District Court for the Southern District of New York after a three-day trial before the Honorable Richard Owen, United States District Judge, sitting without a jury.

Indictment 74 Cr. 776, filed August 5, 1974, charged John Paul Bommarito and Herbert Wolf in Count One with conspiring to distribute methamphetamine and to possess it with intent to distribute and in Count Two with the possession and sale of 199 grams of methamphetamine on March 8, 1974, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846.

On March 4, 1975, both defendants signed waivers of trial by jury (Tr. 8-10)* and trial commenced before Judge

* Citations to "Tr." refer to the trial transcript.

Owen. At the close of the Government's case, both defendants moved for a judgment of acquittal. The motion of Herbert Wolf was granted as to Count Two only, and the motions were otherwise denied. At the close of all the evidence and after argument of counsel, the Court found Bommarito guilty on both counts and Herbert Wolf not guilty on the remaining Count One (Tr. 316).*

On May 19, 1975, Bommarito was sentenced to four years in prison on each count, to be served concurrently with each other and with sentences imposed by federal counts in Florida and Michigan, to be followed by four year of special parole.**

On June 24, 1975, this Court denied Bommarito's motion for bail pending appeal.***

Statement of Facts

The Government's Case

The principal Government witness was Luigi Ciraco. He testified that in December, 1973, he flew to Miami, Florida, with the purpose of finding drugs, and in particular methamphetamine, to purchase and resell in the New York area (Tr. 24). Soon after his arrival in Miami, he met Herbert Wolf at a party, and thereafter Wolf invited Ciraco to stay at his home. While staying with Wolf, Ciraco asked Wolf to find someone with access to drugs, and Wolf re-

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* Neither party made a request for special findings of fact pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure.

** Prior to trial, the Government filed an information pursuant to 21 U.S.C. § 851 charging Bommarito with a prior narcotics conviction, which Bommarito admitted at his sentence (Tr. 32).

*** Between the time of his conviction and the imposition of sentence Bommarito, who had remained free on bail after trial (Tr. 317), surrendered to serve his sentence on prior convictions in other Districts.

plied that he knew the defendant Bommarito. Several days later, Wolf arranged a meeting between Bommarito and Ciraco. At this meeting Bommarito brought up the subject of drugs and offered to sell Ciraco a pound of methamphetamine for $5,500, with Bommarito to provide the drugs in advance of payment and Ciraco to pay after he had sold the drugs in New York, and with the understanding that if the transaction was successful Ciraco would return and purchase further pounds of methamphetamine (Tr. 29-31, 164). Bommarito and Ciraco had another meeting during which Ciraco gave Bommarito two addresses and telephone numbers at which he could be reached, one in Mt. Vernon, New York, and the other in Yonkers, New York (Tr. 32). Three or four days after this second meeting, they met a third time; Bommarito stated that he expected the arrival of the pound of methamphetamine momentarily and gave Ciraco $100 to buy fishing tackle with which to amuse himself while awaiting the drugs. Later in the day, a man unknown to Ciraco arrived at the house and provided Bommarito with a package, which Bommarito in turn handed over to Ciraco with the statement, "This is the pound, check it out" (Tr. 33-34).

Soon thereafter, Ciraco flew back to New York with the pound of methamphetamine and sold eight ounces of the drug to several buyers in various small amounts. On March 8, 1974, he was arrested in Yonkers, New York, in possession of the remaining eight ounces of methamphetamine while he was awaiting a meeting with yet another buyer to sell the remainder of the methamphetamine (Tr. 36). Prior to his arrest, however, Ciraco had sent to Bommarito in Miami $1,500 of the purchase money by means of a Western Union money order (Tr. 36). Also prior to his arrest he spoke several times over the telephone with Bommarito between Yonkers, New York, and Miami about the progress of his sale of Bommarito's "speed"; some of these telephone calls were initiated by Bommarito and some by Ciraco (Tr. 37-38).

Following his arrest on March 8, 1974, Ciraco agreed to cooperate with Drug Enforcement Administration agents in an effort further to investigate Bommarito and other possible drug violators (Tr. 40). On March 9, 1974, Ciraco made the first of several telephone calls to Bommarito which were monitored and tape recorded by drug agents with Ciraco's consent. In this conversation, Bommarito agreed to meet Ciraco in Detroit to receive the remaining $4,000 due for the pound of methamphetamine (GX 4; Tr. 195).*

On March 13, 1974, Ciraco, accompanied by Group Supervisor Anthony Senneca and Special Agent Arthur Anderson of the Drug Enforcement Administration, flew to Detroit for his meeting with Bommarito. The three proceeded to a hotel where Ciraco had a tape-recorded telephone conversation with Bommarito. In these phone calls Ciraco told Bommarito that he had a "friend" who was interested in purchasing drugs, and Bommarito said to "bring him" (Tr. 48; GX 5).

Later in the evening of March 13, Ciraco, together with Group Supervisor Senneca, acting in an undercover capacity as a drug dealer, met Bommarito and were driven to Bommarito's Detroit home. At the house, Ciraco introduced Senneca to Bommarito, and Senneca and Bommarito began negotiations for Bommarito to sell roughly ten pounds of methamphetamine to Senneca. Because of disagreement about price, however, no firm deal was made. At the meeting, however, Ciraco gave Bommarito $4,000 as final payment for the pound of drugs he had been given in Florida.**

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* Citations to "GX" refer to the Government's exhibits in evidence.

** This money consisted of official advance funds provided by the Government.

On the morning of March 14, Ciraco received a telephone call from Bommarito telling him to stay in his room, and several minutes later a man whom Ciraco did not know arrived at the door of his hotel room and left a package of what subsequently was found to be a pound of methamphetamine (Tr. 54-55). Soon thereafter, Bommarito himself appeared in the lobby of the hotel and met with Ciraco and Senneca. The three agreed that the pound that had been delivered that morning was to be the first of a ten-pound delivery that Senneca and Ciraco were to sell in New York at a price of $3,500 per pound. They agreed that if they were to continue with the deal, Ciraco was to call a certain Detroit telephone number and leave a coded message. Shortly after the meeting, Ciraco, Senneca and Anderson (who, together with DEA agents from the Detroit office, had been on surveillance) returned to New York with the pound of methamphetamine. Later in the same day, Ciraco telephoned the contact telephone number in Detroit and left a coded message indicating that the delivery of the remaining nine pounds should not take place (Tr. 57; GX 6, 7).

During the following days, Ciraco had several further telephone conversations with Bommarito, also recorded with Ciraco's consent, in which he told Bommarito that Senneca had sold the pound of methamphetamine purchased in Detroit and arranged with Bommarito to fly to Miami to deliver the $5,000 due Bommarito for that pound (Tr. 59-60; GX 8,9). On March 25, 1974, Ciraco flew to Miami in the company of Special Agent Anderson and, late that night, met Bommarito and paid him $5,000 in official advance funds that had been provided him. After returning to New York, Ciraco had one further conversation with Bommarito, in May, 1974, in which they agreed to keep in touch about further drug deals (Tr. 63; GX 11).

Several Drug Enforcement Administration agents testified about observations they had made concerning Ciraco's

adventures. In particular, Edward Maher testified that on March 8, 1974, he arrested Ciraco in Yonkers, New York and seized approximately 8 ounces of methamphetamine. (Tr. 18; GX 1).* Special Agent Anthony Senneca described his meetings with Bommarito while acting as an undercover agent during Ciraco's trip to Detroit. In particular, he detailed the conversation between himself and Bommarito in the hotel lobby in which they agreed upon a further sale of nine pounds of methamphetamines to complement the pound that was delivered in the morning of March 14, 1974 (Tr. 185-188). Special Agent Anderson testified about his observations as a surveillance agent during Ciraco's trip to Detroit and during his trip to Miami on March 24, 1974, to deliver the $5,000 to Bommarito (Tr. 201-221).**

The Defense Case

The defense case consisted entirley of recalling Louis Ciraco as a witness (Tr. 240-257). On direct examination, he was further questioned about his activities in Florida and elsewhere. He stated, among other things, that he told Bommarito in Florida at the time of their first meeting that he would re-sell any methamphetamines he purchased from Bommarito in New York (Tr. 248). On cross-examination by the Government, Ciraco stated that during the negotiations between Bommarito and Senneca

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* Both Bommarito and Wolf agreed to a stipulation, which was admitted into evidence as Government's Exhibit 18, that the substances admitted into evidence as Government's Exhibit 1 (the narcotics found in Ciraco's possession at the time of his arrest) and 2 (the narcotics delivered to Ciraco in Detroit) were in fact methamphetamine. (Tr. 211).

** In addition Charles Greutzner, an employee of the Western Union Corporation, identified documents showing that $1,500 had been wired from Lou Ciraco in Mt. Vernon, New York, to John Paul Bommarito in North Miami Beach, Florida, on March 2, 1974 (Tr. 173-179; GX 14, 15).

in Detroit on March 14, 1974, Bommarito proposed a plan whereby Senneca would deliver payment for ten pounds of drugs in Detroit, and in return Bommarito would telephone Senneca in New York and tell him where the drugs were stashed (Tr. 255).

ARGUMENT

POINT I

Wharton's Rule does not require the reversal of the conspiracy conviction of Bommarito.

Bommarito contends on appeal that under the Wharton Rule his conviction for conspiracy to violate the federal narcotics laws cannot stand. This argument is frivolous.

Wharton's Rule derives from a section of Wharton's classic treatise on criminal law and procedure. The current version of this treatise's statement of the rule reads as follows:

> "An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission." I Anderson, Wharton's Criminal Law and Procedure, § 89, p. 191 (1957).

Bommarito claims that since his co-defendant Herbert Wolf was acquitted of the charges against him in this indictment, the only possible co-conspirator with whom Bommarito could have joined was Louis Ciraco. In Bommarito's analysis, since two persons were necessary to commit the transaction in drugs that formed the basis of the substantive count, it follows, he claims, that Bommarito cannot be found guilty of a conspiracy to commit this offense. This claim has no basis in the facts of this case, the law governing narcotics consparacies, or in common sense.

First, it is quite clear from the decisions discussing the policy and application of the Wharton Rule that the Rule has no relevance to drug conspiracies. In the recent decision of *Ianelli* v. *United States*, — U.S. —, 43 U.S.L.W. 4423, 4427 (March 25, 1975),—a case neither mentioned nor discussed in Bommarito's brief—the Supreme Court included in a thorough examination of the Rule the following observation which alone disposes of Bommarito's argument here:

> "The classic Wharton's Rule offenses—adultery, incest, bigamy, dueling—are crimes that are characterized by the general congruence of the agreement and the completed substantive offense. The parties to the agreement are the only persons who participate in the commission of the substantive offense, and the immediate consequences of the crime rest on the parties themselves rather than on society at large [citation omitted]. Finally, the agreement that attends the substantive offense does not appear likely to pose the distinct kinds of threats to society that the law of conspiracy seeks to avert." *Id.*

In the area of narcotics violations, the inherent inapplicability of the Wharton Rule is plainly apparent. Unlike the "classic Wharton's Rule offenses", drug offenses necessarily involve "immediate consequences" for society as a whole rather than for the participants themselves—particularly when, as here, the drugs were not to be consumed by the immediate buyer but were sold, and were intended to be sold, to third parties.

Further, in *Ianelli* the Supreme Court found that even though the substantive crime in the case before it—a violation of 18 U.S.C. § 1955—required a plurality of actors, an examination of the legislative history of the Organized Crime Control Act showed that Congress intended to maintain conspiracy and the substantive crime as entirely

separate and distinct offenses. *Ianelli* v. *United States*, *supra*, 43 U.S.L.W. at 4428-29. In the statutory scheme forbidding trafficking in narcotics, Congress specifically recognized the significance of conspiracies to violate the narcotics laws by providing a separate stature for such conspiracies, 21 U.S.C. § 846. In the face of legislative history underscoring a congressional intent to preserve the distinction between conspiracy and substantive violations of the law at least as strong as that found determinative in *Ianelli*, *see* 1970 U.S. Code Cong. & Admin. News at 4566, 4567,* the irrationality of Bommarito's novel argument ** is apparent. See *United States* v. *Marshall*, 513 F.2d 274, 276 (5th Cir. 1975).

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* Indeed, the reasoning of the Court in *Ianelli* in concluding that Congress did not intend conviction under 18 U.S.C. § 1955 to supplant or preclude a separate conspiracy conviction is directly applicable to an analysis of the Comprehensive Drug Abuse Prevention and Control Act, passed in the same year as the Organized Crime Control Act. The Court in *Ianelli* noted that the basic purpose of the Organized Crime Control Act was to "seek the eradiction of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime", including special penalties for engaging in continuing criminal conduct. *Id.* at 4428. In addition, the Court noted that Congress was fully aware of the "distinct nature of a conspiracy and the substantive offenses that might constitute its legal end". *Id.* at 4429.

The intent of Congress to facilitate law enforcement by maintaining both substantive and conspiracy liability for criminal violations is if anything clearer with respect to the Comprehensive Drug Abuse Prevention and Control Act. Not only does the law also contain a separate provision supplanting the general federal conspiracy statute, it also provides an additional prohibition and severe sanction for management of a large scale, multi-participant narcotics enterprise, 21 U.S.C. § 848.

** Indeed, Bommarito has cited not a single case applying to Wharton's Rule to narcotics conspiracies.

Moreover, the inapplicability of the Wharton Rule argument is particularly manifest in the context of the facts of this case. Bommarito claims that the conspiracy was simply that "[i]n order for Mr. Bommarito to sell methamphetamine to Louis Ciraco, there was necessarily mutual cooperation between the two. Mr. Bommarito agreed to sell and Mr. Ciraco agreed to buy" (Brief at 7). Bommarito's simplistic argument ignores the fact that the conspiracy between Bommarito and Ciraco went considerably beyond an agreement that Bommarito would sell and Ciraco would buy the single pound of methamphetamine charged in Count Two. Moreover, and critical here to the limitation of the Wharton Rule to offenses which require a plurality of actors, Bommarito was not indicted in Count One merely for conspiracy to distribute controlled substances but was also charged with conspiracy with Ciraco and others to possess such substances with intent to distribute. While actual distribution might arguably require more than one person in order to be effective, as a matter of logic and common sense possession with intent to distribute can be—and often is—carried off by one person acting alone; otherwise the Government would be barred from prosecuting any narcotics dealer found with large amounts of narcotics unless it could identify and prove the participation of the person to whom the dealer intended to make a sale. It follows, therefore, that even if the Wharton's Rule were fully to apply to narcotics transactions, by its own terms it does not apply to conspiracies to possess with intent to distribute.*

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* To the extent that the Court finds that the decision in *United States* v. *Zeuli*, 137 F.2d 845 (2d Cir. 1943) is inconsistent with this position the Government suggests that the authority of *Zeuli* has been eroded by subsequent decisions of this Court and by the decision of the Supreme Court in *Ianelli, supra*. In addition, Judge Hand's opinion in *Zeuli* indicates that it was not based upon the Wharton's Rule itself (which was never mentioned in the opinion) but rather upon the principle that a conspiracy must be co-extensive with the agreement actually entered into by the

[Footnote continued on following page]

Finally, Bommarito ignores the fact that the record is replete with proof showing that persons "to the Grand Jury known and unknown" joined with Ciraco and Bommarito in the conspiracy.* Several persons who played minor but active roles in the actual transactions in drugs—such as the person who delivered the amphetamine to Bommarito in Florida and the person who delivered the second pound of drugs to Ciraco in Detroit—were described but not identified by Ciraco. Others, including persons present at the meeting in Bommarito's house in Detroit on March 13, 1974, were actually named by Group Supervisor Senneca (Tr. 184), and counsel for Bommarito admitted during trial that he had been informed by the Government prior to trial that these people were unindicted co-conspirators (Tr. 204). Since Bommarito failed to request a specific finding as to whether any or all of these people were considered co-conspirators by the District Court, he is bound on appeal with the general finding of guilt and the showing that the record contains sufficient evidence to support such a finding. *United States* v. *Devenere*, 332 F.2d 160, 162 (2d Cir. 1964); see also *Lustiger* v. *United States*, 386 F.2d 132, 135 (9th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968). Since, as Bom-

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defendant. Relying on *United States* v. *Crimmins*, 123 F.2d 271 (2d Cir. 1941); *United States* v. *Falcone*, 311 U.S. 205 (1940); and *United States* v. *Peoni*, 100 F.2d 401 (2d Cir. 1938), Judge Hand noted, "[A]lthough he [Zeuli] knew [the bonds] to be stolen, he bought them without any purpose of securing to the thieves the fruits of their theft; the venture, so far as he was concerned, began, as it ended, with the purchase". As will be discussed elsewhere in this brief, see pp. 14, 21, *infra*, the conspiracy to which Bommarito was a party, unlike that in *Zeuli*, quite clearly included an understanding that Ciraco would return the "fruits" of the sale of methamphetamines in New York to Bommarito.

* The failure to adduce proof as to the identity of each of these associates is immaterial to the validity of Bommarito's conviction for conspiring with them, as the Supreme Court has explicitly held that "one person can be convicted of conspiring with persons whose names are unknown." *Rogers* v. *United States*, 390 U.S. 367, 375 (1951).

marito recognizes, this Court has recognized repeatedly that Wharton's Rule is satisfied when more than the plurality required for the commission of the substantive offense participate in the conspiracy, *United States* v. *Frank*, Dkt. No. 74-2639 (2d Cir., June 27, 1975), slip op. 4437 at 4442-4443; *United States* v. *Becker*, 461 F.2d 230, 234 (2d Cir. 1972), vacated and remanded on other grounds, 417 U.S. 903 (1974); *United States* v. *Benter*, 457 F.2d 1174, 1178 (2d Cir. 1972), *cert. denied*, 409 U.S. 842 (1973), Wharton's Rule is utterly inapplicable to the facts of this case.

POINT II

The evidence was more than sufficient to support a conspiracy conviction.

Bommarito's second argument, that there was insufficient evidence to support a conviction on the conspiracy count, is equally without merit.

Bommarito preliminarily appears to argue that the judgment should be reversed because the District Court *may* have considered facts occurring after March 9, 1974, in order to find a conspiracy and that after March 9, 1974, no conspiracy could have existed since Ciraco at that time was a Government informant. Initially, it should be noted that this argument fails as an issue of fact, since, as the Government has already discussed with respect to Point I, there was adequate evidence tending to show that Bommarito was still conspiring with others than Ciraco during the Detroit phase of the transactions and that the object of this conspiracy was still to sell drugs in New York (ante, pp.). In addition, the absence of specific findings of fact by the District Court cannot be raised as an issue on appeal. Not only did counsel have but not use an opportunity prior to return of the verdict to make the present legal argument to the District Court, but, as discussed above, he failed to make use of Rule 23(c) of the Federal Rules of Criminal Procedure to request specific findings. He thus cannot

complain on appeal of the absence of such specific findings. *United States* v. *Devenere, supra,* 332 F.2d at 162.

Bommarito then proceeds to argue that, looking only at the evidence adduced concerning events prior to March 9, 1974, the evidence shows nothing more than a simple sale of narcotics by Bommarito to Ciraco.* This contention is squarely refuted by the record. Ciraco explicitly stated that his intent in going to Miami was to find "speed" to sell in New York (Tr. 24), and that when he first discussed "speed" with Bommarito, the latter offered to sell *ten* pounds of amphetamines while Ciraco stated that he could only deal in one pound at a time (Tr. 164; see also Tr. 232). Ciraco also stated that he intended to sell the drugs in New York and so informed Bommarito. In addition, Ciraco testified that when he returned to New York, and prior to his arrest in Yonkers on March 8, he discussed his efforts to sell the amphetamine with Bommarito on the telephone several times, and sent $1,500 of the purchase money to Bommarito in Florida. From these facts alone, there was ample evidence from which the trier of fact could find that Bommarito had an on-going agreement and understanding with Ciraco to sell drugs in New York—an agreement in which the immediate aim was to dispose of the pound of amphetamines transferred in Miami, but which encompassed the clear intent to deal further in drugs following the successful completion of the first instaliment. E.g. *United States* v. *Purin,* 486 F.2d 1363, 1369 (2d Cir. 1973), *cert. denied,* 417 U.S. 930 (1974). See also *United States* v. *Mallah,* 503 F.2d 971, 975-976 (2d Cir. 1974), *cert. denied,* — U.S. —, 43 U.S.L.W. 3511 (March 25, 1975); *United States* v. *D'Amato,* 493 F.2d 359, 362-365 (2d Cir.), *cert. denied,* 419

* Bommarito does not contend on this appeal that there is insufficient evidence upon which venue could be based in the Southern District of New York. At any rate it is clear that since at least one of the overt acts charged in the indictment took place in the Southern District that venue for the conspiracy charge was properly laid here. *Dealy* v. *United States,* 152 U.S. 539, 547 (1894).

U.S. 826 (1974); *United States* v. *Manfredi*, 488 F.2d 588, 596-597 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States* v. *Marrapese*, 486 F.2d 918 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974).

The facts here are radically different from those underlying the decision in *United States* v. *Peoni*, 100 F.2d 401 (2d Cir. 1938), upon which Bommarito principally relies. In *Peoni*, the Court simply held that no one may be held liable for a conspiracy beyond "the fair import of the concerted purpose or agreement as he understands it", *id.* at 403, and an agreement that counterfeit bills be possessed by a third person could not be inferred from the fact that when Peoni sold some counterfeit bills to his alleged co-conspirator he "knew that somebody besides [the co-conspirator] might get them". *Id.* Here, however, Bommarito cannot credibly claim that he did not know and intend that Ciraco would possess the drugs in New York, since, as the evidence makes perfectly clear, the explicit terms of the agreement was that Ciraco would take the drugs to New York and send Bommarito a stated share of the proceeds of his resale of them there.

Furthermore, as will be discussed more fully in the portion of this brief dealing with aiding and abetting, Part IV, *infra*, *Peoni* has been limited by this Court to situations where a defendant is charged with participation —either as a co-conspirator or as an aider and abettor— in the possession by a *third* party of forbidden articles acquired from a vendee of the defendant in an isolated, discrete transaction. See *United States* v. *Campisi*, 306 F.2d 308, 311 (2d Cir.), *cert. denied*, 371 U.S. 929 (1962).* Since Bommarito was charged in this case with conspiring

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* While the *Campisi* decision itself concerned only the sufficiency of the evidence as an aider and abettor, the distinction of *Peoni* is nonetheless controlling, since, as Judge Learned Hand remarked in *Peoni* itself, 100 F.2d at 402, the test for determining the sufficiency of the evidence of participation is essentially the same under both conspiracy and aiding and abetting counts.

in the possession of drugs by Ciraco, with whom he dealt directly, it follows that *Peoni* is utterly inapposite. A situation analogous to the present one would have arisen in *Peoni* if Regno, to whom Peoni sold counterfeit money, had been arrested in possession of the bills; the Court simply held that since Regno in turn sold the bills to Dorsey, whom Peoni did not know, Peoni could not be held liable on a conspiracy theory for Dorsey's possession in the Eastern District of New York. Rather, this case is controlled by principles discussed in *Alexander* v. *United States*, 241 F.2d 351 (8th Cir.), *cert. denied*, 354 U.S. 940 (1957), the facts of which are remarkably similar to the facts of this case. In *Alexander*, the defendant, while in the City of Chicago, provided an associate, Robinson, with heroin to be sold to a third party in St. Louis, Missouri. Robinson made partial payment for the heroin and agreed to pay the remainder of the price after the heroin had been sold in St. Louis. Upon arrival in St. Louis he was arrested. The Court of Appeals for the Eighth Circuit held that even though Alexander never left Chicago he was nonetheless liable both for the possession and transportation of heroin in Missouri and for conspiracy to do so. The Court reasoned that "Alexander retained an interest in the heroin he left with Robinson, which was the heroin involved in the offenses charged". *Id.* at 355. See also *United States* v. *Sin Nagh Fong*, 490 F.2d 527, 530-531 (9th Cir. 1974).

Furthermore, as Bommarito admits in his brief (at 14), the events after March 9, 1974, are *at least* relevant for the purpose of showing Bommarito's knowledge and intent prior to that date and to show the intent and pattern of his dealing with Ciraco.* *United States* v. *Mallah*,

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* Indeed, the Government contends—although it is unnecessary for the purposes sustaining the conviction—that the conspiracy continued after Ciraco's arrest between Bommarito and others "to the grand jury known and unknown", since it is clear that Bommarito, acting with others in Detroit, still intended to sell drugs in the New York area.

supra, 503 F.2d at 980-981; *United States* v. *Diorio,* 451 F.2d 21, 23 (2d Cir. 1971), *cert. denied,* 405 U.S. 955 (1972); see generally, *United States* v. *Deaton,* 381 F.2d 114, 117 (2d Cir. 1967). Indeed, the inference from these events that Bommarito knew that Ciraco was selling drugs in New York for Bommarito and intended this result is overwhelming. Not only do the tape-recorded conversations admitted into evidence reveal Bommarito's continued involvement in the proceeds from the sale in New York of the first pound, but the entire course of events in Detroit, including Bommarito's agreement with Special Agent Senneca to deliver drugs to him in New York (or in New Jersey to be sold in New York) show in the clearest possible fashion that Bommarito was intent on a continuing, ongoing relationship with Ciraco and others to sell drugs in New York.

Quite apart from the relevance of Bommarito's subsequent dealings in Detroit to show his intent, the same evidence was admissible to prove the existence of the conspiracy charged, even if limited to the pre-March 9th period as Bommarito contends. *E.g., Anderson* v. *United States,* 417 U.S. 211, 221 (1974); *United States* v. *Super,* 492 F.2d 319, 323 (2d Cir. 1974); *United States* v. *Nathan,* 476 F.2d 456, 459-460 (2d Cir.), *cert. denied,* 414 U.S. 823 (1974).

Thus, Bommarito's claim that the evidence is insufficient to support his conviction for conspiracy should thus be rejected.*

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* Bommarito spends one part of his brief on the sufficiency of the evidence in criticizing the shortcomings of the Government summation. Brief at 25-27. While the Government contends that the closing argument perfectly properly summarized the evidence, the fact remains that the summation was not evidence and is thus utterly irrelevant to a claim on appeal of insufficient evidence. It is established law that arguments of counsel are not evidence to be considered by the trier of fact. *United States* v. *Foster,* 9 F.R.D. 367, 387 (S.D.N.Y.) (Medina, J.).

POINT III

Bommarito's prior conviction of conspiracy did not bar under the Double Jeopardy Clause his prosecution for an entirely different conspiracy.

Both before and after the trial in this case, Bommarito claimed that his plea of guilty to a conspiracy in the Western District of Oklahoma in October, 1974, precluded his prosecution of the present conspiracy. This claim was properly rejected by the District Court and should be similarly rejected on appeal.

In October 1974, Bommarito pleaded guilty to Count One of Indictment 74-213 filed in September, 1974, in the Western District of Oklahoma.* The indictment charged that "in the Western District of Oklahoma" various named individuals, including Bommarito, conspired with others to violate the federal narcotics laws. The indictment specified that the conspiracy extended "from about February 1974" up to the date of the filing of the indictment, and in its "means" section it stated that the defendants would "transport and deliver" and "distribute" controlled substances to "one or more of the defendants in the Western District of Oklahoma" (App. 1b-2b).** Overt act number one, the only overt act to mention Bommarito, alleged that in February, 1974, Bommarito "delivered approximately 10 pounds of methamphetamine to James Claude Walls and Daniel A. Stratton at Oklahoma City, Oklahoma." *Id.*

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* The guilty plea to the Oklahoma indictment was actually entered in the Southern District of Florida, along with a like plea to a separate indictment filed in that District, pursuant to Rule 20 of the Federal Rules of Criminal Procedure.

** Citation to "App." refers to the appendix filed by Bommarito.

In the motion papers filed on the eve of trial in this case, in argument on the motion to bar prosecution made before the District Court, and indeed, in its brief to this Court, Bommarito has not introduced the minutes of Bommarito's plea to this indictment or one shred of evidence other than the indictment to which he pleaded guilty. In spite of this, Bommarito now argues that the conspiracy to which he pleaded in the Oklahoma indictment is the same as the conspiracy for which he was prosecuted in this case, and that his conviction in the latter case is this barred by the Double Jeopardy Clause. This argument is frivolous and should be rejected.

Bommarito relies entirely on the decision of this Court in *United States* v. *Mallah, supra,* and indeed cites that case alone in his discussion on this point. The facts in *Mallah,* however, were radically different from those in the present case. In *Mallah,* the two indictments in which the defendant Pacelli was charged with conspiracy both alleged conspiracies commencing on precisely the same date; both conspiracies took place in New York City; both shared a core co-conspirator; and many of the co-conspirators in the first *Pacelli* conviction were shown to have at least known the members of the second conspiracy. 503 F.2d at 986. The Court ruled that because of the similarities in time, place and personnel, the defense had met its burden of coming forward with evidence tending to show that the conspiracies were the same, and the burden then shifted to the Government. Here, however, Bommarito has failed to introduce *any* facts tending to show the identity of the two conspiracies other than an indictment alleging that at a period of time overlapping in part with the conspiracy alleged in this case, he dealt in methampethamine. There is *no* indication on the face of the Oklahoma indictment that Bommarito dealt in drugs any place but in Oklahoma, and there was *no* showing in the course of the trial in this case that Bommarito went anywhere near or even discussed Oklahoma or activities in Oklahoma. Similarly, the names of those

with whom Bommarito was alleged to have conspired in Oklahoma were never mentioned in this trial.

Rather than falling under the principles and facts discussed in *Mallah* this case is governed by the numerous decisions of this Court, blithely ignored by Bommarito in his brief, delineating the test to be used in measuring a claim of double jeopardy. As this Court held in *United States* v. *Kramer*, 289 F.2d 909, 913 (2d Cir. 1961), a claim of double jeopardy depends on whether "the evidence required to support a conviction upon one of [the indictments] would have been sufficient to warrant a conviction upon the other". See also *United States* v. *Cala*, Dkt. No. 75-1043 (2d Cir., July 23, 1975), slip op. 4995, 4996-4997; *United States* v. *Mallah, supra*, 503 F.2d at 985 n. 7; *United States* v. *Amato*, 367 F. Supp. 547, 550 (S.D.N.Y. 1973). Since an agreement with one set of persons to sell drugs in Oklahoma would hardly suffice to convict Bommarito of agreeing with a wholly different set of persons to sell drugs in New York, the facts of this case clearly fail this test. *United States* v. *McCall*, 489 F.2d 359, 362-363 (2d Cir. 1973), *cert. denied*, 419 U.S. 849 (1974); *United States* v. *Prince*, 515 F.2d 564, 567 (5th Cir. 1975). Further, on a number of occasions this Court has held that even if two conspiracies overlap in time and each name several common co-conspirators, a double jeopardy claim is not necessarily established unless the same agreement was shown. *United States* v. *Nathan, supra*, 476 at 458, n. 4; *United States* v. *Barzie*, 433 F.2d 984 (2d Cir. 1970), *cert. denied*, 401 U.S. 975 (1971).

In the absence of any showing even remotely meeting the test of these cases, Bommarito's claim amounts to an assertion that once he has pleaded guilty to a conspiracy he is immune to any subsequent conspiracy alleging activity by him during a similar period of time, even if the place, personnel and the acts themselves are entirely separate. This claim is simply absurd and should be rejected by this Court.

POINT IV

The facts adduced at trial were more than sufficient to show that Bommarito aided and abetted the sale of narcotics.

Bommarito's fourth claim is that the facts at trial were insufficient to show that he had the mental state necessary to convict him of the substantive sale of narcotics as an aider and abettor. This claim, for which Bommarito is unable to cite a single decision of this Court as precedent, is unavailing.

The test for whether a defendant aided and abetted a principal in the commission of a substantive offense, and is thus liable as a principal under 18 U.S.C. § 2, is whether the accessory "associate[s] himself with the venture, . . . participate[s] in it as in something he wishes to bring about, [and] seek[s] by his action to make it succeed." *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, *J.*); *United States* v. *Umans*, 368 F.2d 725, 728 (2d Cir. 1966), *cert. dismissed as improvidently granted*, 389 U.S. 80 (1967). It is overwhelming clear from the evidence in this case, which has already been discussed with respect to the sufficiency of the evidence to support the conspiracy conviction, that Bommarito aided and abetted Ciraco in selling drugs and possessing them with the intent to distribute in New York. Bommarito provided the drugs to Ciraco on the understanding that Ciraco would sell the drugs in New York and send Bommarito back his share in the proceeds. During the period when Ciraco was actually in New York in this endeavor, Bommarito kept close contact with him by means of the telephone and actually received from Ciraco a first installment of the drugs. These facts alone were enough to show that Bommarito "associated himself with the venture" and "wished to bring it about". In addition, the events after Ciraco's decision to cooperate with the Government showed Bommarito's clear

intent to use Ciraco as a conduit to sell drugs in the New York market. See Point II, *supra*. In the face of these facts Bommarito's claim that once Ciraco took the drugs from Bommarito in Florida he "could use it for personal consumption, give it away, or sell it", Appellant's Brief at 37, is clearly refuted by the evidence.

This is not a case like *United States* v. *Peoni*, *supra*, where a defendant is charged with aiding and abetting the possession of a third party with whom he has not dealt. In that case, Peoni sold counterfeit money to one Regno, who in turn sold it to Dorsey. Dorsey was arrested in the Eastern District of New York, and Peoni was charged with aiding and abetting Dorsey's possession there. The Court held that while Peoni might have surmised that Regno would sell the bills to someone else, he could not be held liable as an aider and abettor of *Dorsey's* illegal possession of them in the Eastern District. That decision has been limited by this Court in *United States* v. *Campisi*, *supra*, 306 F.2d at 311:

> In *United States* v. *Peoni*, . . . the defendant was charged with aiding and abetting the possession of a remote vendee of counterfeit money. In reversing the conviction the court relied on the fact that the principal, i.e., the individual whose possession defendant was charged with abetting, was not a vendee of the defendant. The court expressly left open the question whether same result would obtain if the immediate vendee was charged with possession, a question closely analogous to that presented in this appeal.

The Court went on to find certain defendants in that case liable for the crime of aiding and abetting the crime of forging and uttering stolen bonds, even though the actual forging and uttering was committed by individuals to whom the complaining defendants had sold the bonds. Here, since

it is clear that Bommarito dealt directly with Ciraco, who in turn went to New York where he was arrested in possession of the methamphetamines given to him by Bommarito, it follows that *Peoni* is utterly inapposite, and this case is governed rather by the principles enunciated in *Campisi*. See also *Alexander* v. *United States, supra*.

The facts here clearly meet this Court's requirement for aiders and abettors and Bommarito's contention to the contrary has no merit.*

POINT V

The absence in the indictment of any reference to 18 U.S.C. § 2 does not vitiate Bommarito's conviction as an aider and abettor.

Bommarito claims that merely because the indictment did not contain a reference to 18 U.S.C. § 2 and the Government did not formally claim prior to trial that Bommarito was an aider and abettor, his conviction on the substantive charge of participating in the sale and possession with intent to sell narcotics in New York must be reversed. This claim has been squarely rejected by this Court in prior decisions raising the precise point, and, particularly in the context of the facts of this case, his claim must be denied.

While Bommarito's brief, at pp. 38-39, rather coyly states that counsel for Bommarito is aware that case law

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* As with his argument on the sufficiency of the evidence to support the conspiracy conviction, Bommarito does not contend on appeal that there was insufficient evidence to show that venue lay in the Southern District of New York. It is nonetheless clear that if the principal commits the substantive act within the District, the aider and abettor can be found liable here even though he has never entered the District. *United States* v. *Bozza*, 365 F.2d 206, 221 (2d Cir. 1966); *United States* v. *Gillette*, 189 F.2d 449, 451 (2d Cir. 1951), *cert. denied*, 342 U.S. 827 (1951); *United States* v. *Sweig*, 316 F. Supp. 1148 (S.D.N.Y. 1970).

holds that the indictment need not state the principal's name in the indictment or give notice of the operation of 18 U.S.C. § 2, he fails to cite the decisions in *United States* v. *Taylor*, 464 F.2d 240, 242 n. 1 (2d Cir. 1972), and *United States* v. *Tropiano*, 418 F.2d 1069, 1083 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970), or to note that in these decisions the precise claim raised by Bommarito was rejected by this Court. Other circuits have considered the matter have ruled similarly. See *United States* v. *Matousek*, 483 F.2d 286, 288 (8th Cir. 1973); *United States* v. *Bullock*, 451 F.2d 884, 888 (5th Cir. 1971); *Levine* v. *United States*, 430 F.2d 641, 643 (7th Cir. 1970), *cert. denied*, 401 U.S. 949 (U.S. 1971); *United States* v. *Duke*, 409 F.2d 669, 671 (4th Cir. 1969); *Wood* v. *United States*, 405 F.2d 423, 425 (9th Cir. 1969); *Lawrence* v. *United States*, 357 F.2d 434, 438 (10th Cir. 1966).

In the context of this case, the claim by Bommarito that he was surprised by the assertion of aider and abettor status is particularly weak, and assertions in his brief that he was denied due process because of his inability to defend against the charges against him cannot be accepted. First, the matter of whether Bommarito was "surprised" was explored by the District Court, who noted that while Bommarito had made a number of requests for certain information in the form of a bill of particulars, he had not made any requests to determine the facts surrounding the substantive count or the Government's theory (Tr. 235). Thus, it is clear that Bommarito passed up an opportunity prior to trial to discover the information that he now claims "surprised" him at trial, that is, whether he was charged as a principal or as an aider and abettor and, if the latter, the name of the principal.

Second, Bommarito's claim of surprise can only be considered disingenuous in the present case. Count One of the Indictment 74 Cr. 776, charging a conspiracy among Bommarito and Wolf and others, states in Overt Acts 2 and 3

that Louis Ciraco, as a co-conspirator, committed certain acts in New York—the only overt acts listed in the indictment that took place in New York. From this fact alone Bommarito and his counsel must have surmised that Bommarito was being charged as an aider and abettor with Ciraco as a principal. Furthermore, the Government's response to Bommarito's discovery requests—all of which were directed to the conspiracy count—and the furnishing of the transcripts of telephone conversations between Ciraco and Bommarito could only have informed Bommarito of the Government's basic theory in Count Two.

Finally, as Bommarito's counsel admitted during trial, Bommarito received explicit notice of the Government's theory of the case on the morning trial commenced in the form of a memorandum of law addressed to Bommarito's motion to dismiss Count Two of the indictment on the grounds that Bommarito had never set foot in New York State or in the Southern District of New York. Not only does the motion itself show that Bommarito was aware that the Government must have been proceeding on an aider and abettor theory, but the Government's response—which Bommarito's counsel admitted receiving prior to trial (Tr. 2; 283)—explicitly states that "the defendant is charged as an aider and abettor to the offense alleged in Count II." Government's Memorandum of Law at 6. Thus, even though Bommarito is not entitled to advance notice of the Government's theory, at least in the absence of any request, he received such notice in this case prior to trial and at no time requested a continuance to prepare a defense to such a theory. Indeed, he informed the District Court that he was ready to proceed (Tr. 7). Thus, his claim on this issue is utterly without merit.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Frederick T. Davis being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 8th day of August, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Richard Chosid, Esq.
5640 W. Maple Road
West Bloomfield, Mich. 48033

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Frederick T. Davis

Sworn to before me this
8th day of August, 1975

Maria A. Morales
COUNTY OF New York
Registration No. 41-5218511
Commission Expires 03/30/76